Filed 4/8/10 In re Emilio C. CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re EMILIO C. et al., Persons Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. DIANNE H. et al., Defendants and Appellants.	D055784 (Super. Ct. No. J513505C-D)

APPEALS from orders of the Superior Court of San Diego County, Laura J. Birkmeyer, Judge. Affirmed.

Dianne H. and Sergio C. (together, the parents) appeal juvenile court orders terminating their parental rights to their minor children Emilio C. and Liliana C. (together, the minors) under Welfare and Institutions Code[1] section 366.26. The parents

1 Statutory references are to the Welfare and Institutions Code.

challenge the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship exception to adoption did not apply to preclude terminating their parental rights. In his appeal, Sergio contends the court erred by terminating his parental rights without evidence he was an unfit parent. Dianne's appeal challenges an order denying her section 388 petition for modification seeking to have the minors placed with her. She contends her circumstances had changed and the minors' best interests would be served by the requested modification. We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2007 the San Diego County Health and Human Services Agency (Agency) filed petitions in the juvenile court on behalf of seven-year-old Emilio, three-year-old Liliana and their two older half siblings, Destini H. and E.H.,[2] based on Dianne's drug abuse and mental illness, and Sergio's failure to protect the children. (§ 300, subd. (b).) Agency filed the petitions after the parents failed to comply with a voluntary services plan, which was offered to them because Dianne admitted using methamphetamine, she had not taken her medication for schizophrenia and she had not fed the minors for two days. The court sustained the allegations of the petitions, declared the minors dependents and placed them in out-of-home care. The court ordered the parents to participate in reunification services, including the Substance Abuse Recovery Management System (SARMS) program.

2 Destini and E.H. are not subjects of this appeal.

The family had a history with Agency dating back to 1996, which included referrals for domestic violence, a filthy home, inadequate food, drug use and emotional abuse. On one occasion, Sergio beat Dianne in the children's presence. He was arrested for battery and injury to a spouse, and for failing to register as a sex offender.[3] On another occasion, Dianne was arrested for assaulting her uncle. Consequently, the children became dependents of the juvenile court. Although the parents and children eventually reunified, they continued to have problems. Both parents had violent criminal histories and had been involved in gangs. Their relationship was volatile, and their arguments resulted in physical confrontations witnessed by the children. Dianne's continued drug abuse and mental illness, and Sergio's failure to drug test or protect the minors required Agency's intervention.

During the initial reunification period, the parents did not comply with their case plans. At both the six-month and 12-month review hearings, the court found returning the minors to their parents' custody would create a substantial risk of detriment to them. The court found Dianne continued to struggle with substance abuse, and Sergio had not found suitable housing or employment. Also, Sergio had permitted Dianne to attend his visitation with the minors in violation of the court's order, which placed the minors at risk. Nevertheless, the court continued services to the 18-month date.

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[3] In 1987, when Sergio was 17 years old, he was required to register as a sex offender after he was involved in a gang rape of a young woman.

During the next six months, Sergio successfully completed SARMS, was participating in a recovery program, maintaining his sobriety and attending individual therapy. He and Dianne remained homeless, even though Dianne had been given housing resources and was employed. Dianne continued to test positive for drugs and entered a residential drug treatment program. Sergio found a job, and was having unsupervised visits with the minors on weekends.

The minors' Court Appointed Special Advocate (the CASA) reported Emilio was in therapy to address symptoms of trauma. He viewed E.H. and Destini as parental figures and considered them to be his main caregivers. Emilio was also receiving support from the paternal aunt, who was the minors' current caregiver. The CASA reported Sergio was inconsistent in his visits with the minors, and the parents had not shown they were sufficiently stable to parent the minors.

In its report for the 18-month hearing, Agency recommended the court terminate services and set a section 366.26 selection and implementation hearing. Dianne had not completed drug treatment and had not complied with therapy expectations. Although Sergio had dealt with his substance abuse, he had failed to obtain housing or employment that would allow him to support his family. He remained in a relationship with Dianne, and his behavior indicated he was unwilling to protect the minors from Dianne's drug use, thus placing the minors at risk of harm.

At the 18-month hearing, the court found returning the minors to parental custody would create a substantial risk of detriment to them. The court set a hearing under section 366.26 to select and implement a permanent plan for the minors.

Agency recommended the court terminate parental rights. The social worker assessed the minors as generally adoptable. They had been in the paternal aunt's care for 16 months and had a strong attachment to her. The paternal aunt was committed to adopting the minors, and was open to allowing supervised visits with the parents. There were also many other families willing to adopt a sibling set like the minors. When the social worker asked the minors whether they wanted to live with their parents or the paternal aunt, they both said, without hesitation, the paternal aunt.

In July 2009 Dianne filed a section 388 petition for modification, seeking to have the minors placed with her with family maintenance services. She alleged her circumstances had changed in that she had adequate housing, was employed and continued to attend Narcotics Anonymous (NA) and Alcoholics Anonymous (AA) meetings. The court ordered a hearing on the petition.

Liliana's therapist reported Liliana had many stress-related behaviors following visits with the parents, including sleeplessness, nightmares, temper tantrums and regressive behaviors. She was worried about her parents and where she would live. The therapist indicated it was the paternal aunt who could provide Liliana with a stable and secure home.

The therapist also reported that when Sergio visited the minors in the paternal aunt's home, he had difficulty managing them without the paternal aunt's direct involvement. When the children had conflicts, Sergio sought out the paternal aunt to manage any disruptions. Sergio had taken the minors to see Dianne without authorization, and told them to lie about it. This greatly upset Liliana, who was agitated

and confused because Dianne made promises to Liliana about returning home. Liliana was also upset following a supervised visit at which Dianne teased Emilio until he cried.

At the hearing on Dianne's section 388 petition, Emilio testified outside the presence of the parents. He said he wanted to live with his paternal aunt because he loved her and she took good care of him. Although he loved his parents and enjoyed visits with them, Emilio felt safer with his paternal aunt. If he could not see his parents anymore, he would be sad, but still wanted to be adopted by his paternal aunt.

The court received into evidence two letters from Dianne's drug treatment counselor and supporting documentation showing Dianne had completed a six-week anger management class, a 16-week parenting class and another parenting education course. Dianne also submitted 15 drug test reports showing she had tested negative from October 2008 to May 2009. According to Dianne's stipulated testimony, she had worked hard to establish a safe and stable drug-free household for the minors, and would continue to do so in the future. She loved the minors very much and believed it was in their best interests to be returned to her. Dianne did not want the minors to be adopted.

The court received into evidence Liliana's stipulated testimony indicating she does not understand the concept of adoption. If asked with whom she wanted to live forever, Liliana would say her mother and her paternal aunt.

After considering the evidence and hearing argument of counsel, the court denied Dianne's section 388 petition, finding Dianne did not meet her burden of showing her circumstances had changed or that returning the minors to her care was in the minors' best interests.

The court then heard argument with respect to the minors' permanent plans. Finding the minors were adoptable and none of the exceptions to adoption applied, the court terminated parental rights and referred the minors for adoptive placement.

DISCUSSION

I

Dianne contends the court erred by denying her section 388 modification petition because the evidence showed her circumstances had changed, and it was in the minors' best interests to be returned to her custody with family maintenance services. Dianne asserts: (1) she completed a 90-day intensive drug treatment program; (2) she had maintained and was committed to her sobriety; (3) she had obtained employment and housing; and (4) she was ready to safely parent the minors, with whom she shared a close bond.

A

Under section 388, a party may petition the court to change, modify or set aside a prior court order. The petitioning party has the burden of showing, by a preponderance of the evidence, there is a change in circumstances or new evidence, and the proposed change would be in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416.) The determination as to whether a previous order should be modified and whether a change would be in the child's best interests is within the sound discretion of the juvenile court. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) The juvenile court's order will not be disturbed on appeal unless the court has exceeded the limits of legal discretion by making an arbitrary, capricious or

patently absurd determination. When two or more inferences reasonably can be deduced from the facts, we may not substitute our decision for that of the juvenile court. (*In re Stephanie M.*, *supra*, at pp. 318-319; *In re Casey D.*, *supra*, at p. 47.)

B

Dianne alleged her circumstances had changed because she was sober and committed to her drug treatment program, she had obtained employment and she had a viable plan to provide the minors with appropriate housing. However, Dianne's petition and supporting documentation show, at most, her circumstances were "changing," but had not changed. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.) Dianne's documented sobriety from September 2008 to May 2009, while commendable, was relatively brief compared to her 10-year history of methamphetamine abuse and her many rehabilitation attempts and eventual relapses. Dianne's poor track record of sustaining her progress in drug treatment, coupled with her failure to fully acknowledge her past behavior in an honest and responsible manner, permitted a reasonable inference Dianne had not rehabilitated sufficiently to warrant having the minors returned to her care.

Further, Dianne did not show she adequately addressed other problems that led to the minors' removal from her custody. There was no evidence she was consistently participating in therapy to help her maintain her sobriety and mental stability. Despite having completed parenting and anger management courses, Dianne was unable to practice appropriate parenting skills, as was evident when she disciplined Emilio during a visit by twisting his ear, and later claiming he cried because he was embarrassed, not hurt. A petition like Dianne's that alleges changing circumstances does not promote

stability for the child or the child's best interests because it would mean delaying the selection of a permanent home to see if a parent, who has failed to reunify with the child, might be able to reunify at some future point. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.) "Childhood does not wait for the parent to become adequate." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.)

Even had Dianne shown changed circumstances, she did not meet her burden of showing it would be in the minors' best interests to be returned to her custody. (See *In re Michael D.* (1996) 51 Cal.App.4th 1074, 1086 [parent seeking modification under § 388 must prove a change in placement to parent's home is in minor's best interests].) At the time of the hearing on the section 388 petition, the focus of the proceedings was on providing the minors with a safe, stable and permanent home. The minors had been in five placements during the current dependency proceedings and were in need of a permanent living arrangement. Although they had an attachment to their parents, they remained troubled by the possibility the parents would resume using drugs. Emilio feared his parents would die from drug abuse. The minors were also upset because the parents had encouraged them to lie about Dianne's unauthorized presence at Sergio's visits.

Further, the minors had been living with the paternal aunt for 18 months, viewed this placement as "home" and said they wanted to continue living there. At this point in the proceedings, there was a rebuttable presumption that continued out-of-home care was in the minors' best interests. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309; *In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) Where, as here, " 'custody continues over a significant

period, the child's need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child.' " (*In re Stephanie M.*, *supra*, at p. 317; *In re Mary G.* (2007) 151 Cal.App.4th 184, 204.) The court evaluated all the evidence in light of the minors' needs for stability and security, and found their best interests would not be served by removing them from a stable and loving home and placing them with Dianne. The court acted within its discretion by denying Dianne's modification petition.

II

The parents challenge the sufficiency of the evidence to support the court's findings the beneficial parent-child relationship exception of section 366.26, subdivision (c)(1)(B)(i) did not apply to preclude terminating their parental rights. The parents assert they regularly visited the minors and had a significant and loving parental relationship with them. They further assert the minors were bonded to them and would experience significant distress if they could no longer see their parents.

A

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds a compelling reason for determining that termination of parental rights would be detrimental to the child under one or more of the enumerated statutory exceptions. (§ 366.26, subd. (c)(1)(A) & (B)(i)-

(vi); *In re A.A.* (2008) 167 Cal.App.4th 1292, 1320.) "The parent has the burden of establishing the existence of any circumstance that constitutes an exception to termination of parental rights." (*In re T.S.* (2009) 175 Cal.App.4th 1031, 1039.) Because a selection and implementation hearing occurs "after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

Section 366.26, subdivision (c)(1)(B)(i) provides an exception to the adoption preference if terminating parental rights would be detrimental to the child because "[t]he parents . . . have maintained regular visitation and contact with the [child] and the [child] would benefit from continuing the relationship." We have interpreted the phrase "benefit from continuing the relationship" to refer to a parent-child relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 574-575; accord *In re Zachary G.* (1999) 77 Cal.App.4th 799, 811; *In re Jason J.* (2009) 175 Cal.App.4th 922, 936-937.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact, an emotional bond with the child or pleasant visits. (*In re Jason J.*, *supra*, 175 Cal.App.4th at pp. 936-937; *In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive emotional attachment from child to parent. (*In re Derek W.*, *supra*, at p. 827; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

We review the court's finding regarding the applicability of a statutory exception to adoption for substantial evidence. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) In this regard, we do not consider the credibility of witnesses, attempt to resolve conflicts in the evidence or evaluate the weight of the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if there is substantial evidence supporting a contrary finding. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) On appeal, the parent has the burden of showing there is no evidence of a sufficiently substantial nature to support the court's finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

B

Here, the juvenile court found, and the evidence showed, the parents had regularly visited and contacted the minors. However, the parents did not meet their burdens of showing there was a beneficial parent-child relationship sufficient to apply the exception of section 366.26, subdivision (c)(1)(B)(i).

The parents were generally appropriate with the minors during visits, and acted in a parental manner. The minors looked forward to visits, were affectionate with the

parents and showed "significant attachments" to them. Nevertheless, the parent-child relationship did not foster feelings of trust and safety in the minors. The parents violated court orders by allowing Dianne to attend Sergio's unsupervised visits, and then asked the minors to lie about it. This contributed to the minors' sense that it was not safe to be truthful. Emilio was concerned that his parents would use drugs again, get arrested or die from drug abuse. He said his father was not dependable, and he was troubled by his parents' instability. Liliana was afraid her parents would spank her or blow smoke in her face. She was conflicted in her feelings about them, sometimes expressing anger after visits, and she continued to show anxious and regressive behaviors. Liliana's therapist believed her attachment to the parents was "tenuous," noting she related to Sergio like he was a playmate rather than a parent. Despite the minors' positive relationship with the parents, there is no indication the minors were in any way negatively impacted by the parents' absence from their daily lives.[4] In this regard, the parents did not show that terminating parental rights would result in "great harm" to the minors. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; *In re Jason J.*, *supra*, 175 Cal.App.4th at p. 938.) "A biological parent who has failed to reunify with an adoptable child may not derail adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

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4 We note Dianne and the minors participated in a bonding study, but the results of that study were not submitted to the court. There is no indication in the record that Sergio requested a bonding study.

Further, the parents did not show that maintaining a relationship with the minors outweighed the benefits of adoption for them. Emilio had previously been a dependent for three years. He and Liliana had experienced much turmoil and instability for more than two years in the present dependency. Both minors expressed their preferences to live with the paternal aunt because they viewed her as someone they could trust and depend on to meet their needs and provide them with a safe and stable home. The court was entitled to accept the social worker's opinion that adoption by the paternal aunt clearly outweighed any benefits of maintaining the parent-child relationship. (*In re Justice P*. (2004) 123 Cal.App.4th 181, 191 [child's interest in stable and permanent home is paramount once a parent's interest in reunification is no longer at issue]; *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 53 [juvenile court entitled to find social worker credible and give great weight to her assessments and testimony].)

C

Dianne relies on *In re S.B.* (2008) 164 Cal.App.4th 289, 298-300, to support her argument she had a beneficial parent-child relationship with the minors even in the absence of "day-to-day" contact or a primary relationship. However, in making its findings, the court here did not rely on the absence of day-to-day contact or the fact the minors did not have a primary attachment to Dianne. The evidence before the court showed the minors, who bear the emotional scars of their history with the parents, longed for the security and stability that only an adoptive home could provide. Although the minors would be sad if they could no longer see their parents, the benefits of adoption for them far outweighed the benefits of maintaining the parent-child bond. Unlike the facts

in *S.B.*, there was no evidence here, direct or by inference, that the minors would be greatly harmed by severance of the relationship.

On the particular facts here, the court was required to, and did, weigh the strength and quality of the parent-child relationship, and the detriment involved in terminating it, against the potential benefit of an adoptive home for the minors. We cannot reweigh the evidence or substitute our judgment for that of the juvenile court. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 53.) Substantial evidence supports the court's finding the beneficial parent-child relationship exception did not apply to preclude terminating parental rights.

III

Sergio contends the court could not terminate his parental rights in the absence of evidence he was an unfit parent.[5] He asserts he never engaged in an affirmative act that put the minors at risk, the evidence at each review hearing showed he made progress with reunification, and by the time of the section 366.26 selection and implementation hearing, all protective issues had been eliminated such that he was no longer an unfit parent.

A

Preliminarily, we note Sergio did not object to the court terminating his parental rights without a current finding of parental unfitness. Thus, he has forfeited the right to raise this argument on appeal. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293 [parent's failure to object or raise certain issues in juvenile court prevents the parent from claiming error on appeal]; *In re Jason J.*, *supra*, 175 Cal.App.4th at p. 932.) Further, Sergio cannot now

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5 Dianne joins in this argument to the extent it benefits her.

challenge the propriety of any detriment findings made at prior hearings, including the jurisdiction and disposition hearings, and the six-month, 12-month and 18-month review hearings. "[A]n appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order on an appeal from a later appealable order . . . ." (*In re Meranda P*. (1997) 56 Cal.App.4th 1143, 1151.)

B

Even had Sergio properly preserved the issue for appeal, his argument has no merit. Before a juvenile court can terminate parental rights, due process requires a finding, by clear and convincing evidence, that the parent is unfit. (*In re Gladys L*. (2006) 141 Cal.App.4th 845, 847; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254.) Once the state has shown a parent is unfit, the juvenile court may assume the child's interests have diverged from those of the parent. (*In re G.S.R.* (2008) 159 Cal.App.4th 1202, 1210-1211, citing *Santosky v. Kramer* (1982) 455 U.S. 745, 760.) "By the time dependency proceedings have reached the stage of a section 366.26 hearing, there have been multiple specific findings of parental unfitness." (*Cynthia D. v. Superior Court*, *supra*, at p. 253.)[6] These prior determinations of parental unfitness and detriment comport with due process because, at this stage of the proceedings, "the evidence of detriment is already so clear and convincing that more cannot be required without prejudice to the interests of the adoptable child, with which the state must now align

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6 Findings at prior hearings that returning a child to parental custody would be detrimental to the child is the equivalent of a finding of parental unfitness. (*Cynthia D. v. Superior Court*, *supra*, 5 Cal.4th at p. 253.)

itself." (*Id*. at p. 256; see also *In re Zeth S*. (2003) 31 Cal.4th 396, 411 [court's prior findings of parental unfitness, detriment and failure to reunify may not be reopened or reconsidered at § 366.26 hearing].)

This family's history with Agency and the juvenile court dates back to 1996. Despite the provision of services by Agency, including assistance with obtaining housing, the parents continued to have problems. When the current petition was filed in 2007, Sergio presented with chronic instability, a history of domestic violence and drug abuse, and an inability to protect the minors from Dianne's mental illness and drug abuse. During the next 18 months, Sergio participated in services, including therapy and drug treatment. However, he was unable to care for the minors because he remained in a relationship with Dianne, who was not mentally stable or addressing her substance abuse, and because he had not found suitable housing or employment in order to support his family. Sergio's understanding of safe parenting was questionable, as evidenced by his allowing Dianne to attend his visits with the minors in violation of the court's order. He exacerbated the minors' fears and anxieties by asking them to lie about the visits. Based on this evidence, presented at the six-month and 12-month review hearings, the court found it would be detrimental to return the minors to parental custody.

By the 18-month hearing, Sergio had maintained his sobriety, but he remained in a relationship with Dianne, who continued to test positive for drugs. Sergio was still homeless, even though Dianne had been given housing resources and was employed. According to the CASA, the parents had not shown they were sufficiently stable to parent the minors. The court terminated services after finding the risk in returning the minors to

parental custody had not been eliminated. The court's detriment findings, amply supported by the evidence, sufficiently established parental unfitness to satisfy due process. (*Cynthia D. v. Superior Court*, *supra*, 5 Cal.4th at p. 253; *In re Amanda D.* (1997) 55 Cal.App.4th 813, 819.) The court was not required to make a finding of current detriment at the selection and implementation hearing when it terminated parental rights.

C

Contrary to Sergio's argument, the court's findings of detriment were not based on his homelessness or poverty, but rather on his inability to provide the minors with a safe and secure home. (Cf. *In re P.C.* (2008) 165 Cal.App.4th 98, 105 [mother's inability to find suitable housing was not sufficient reason to terminate parental rights]; *In re G.S.R.*, *supra*, 159 Cal.App.4th at p. 1215 [court erred by making detriment finding as to nonoffending father where only protective issue was father's inability to afford appropriate housing].) Nothing in the record shows Sergio's failure to obtain suitable housing was the result of poverty or the inability to find affordable housing. Agency's legitimate concerns included stability, not poverty. Moreover, Sergio's housing and employment circumstances were not the sole reason for terminating his parental rights. The court's successive findings of detriment throughout the proceedings were tantamount to clear and convincing evidence of unfitness and were not improperly based on poverty alone.

DISPOSITION

The orders are affirmed.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.